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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-592

SHIRLEY JEAN SUTHERLAND,

Petitioner,

vs.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

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IN THE

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SHIRLEY JEAN SUTHERLAND,

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IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

I.
Jurisdiction.

On March 16, 1974, petitioner filed a Petition for Review of Deportation Order with the United States Court of Appeals for the Ninth Circuit, under §106(a) of the Immigration & Nationality Act [8 USC 1106(a)].

On July 29, 1974, the United States Court of Appeals for the Ninth Circuit affirmed the order of deportation which had been entered on September 21, 1973, by the Board of Immigration Appeals. A Petition for Rehearing en Banc was filed on August 12, 1974. This petition was rejected by the court on October 16, 1974.

On October 22, 1974, petitioner filed a Motion for Stay of Mandate Pending Petition for Certiorari. This

was granted on October 24, 1974, staying mandate on the condition that the Petition for Writ of Certiorari is filed with this Court by November 16, 1974.

Jurisdiction is sought on a writ of certiorari under U.S. Supreme Court Rule 19(1)(b) [28 USC] on the grounds that there is a conflict between decisions of the different courts of appeal on the issue of when a motion to terminate deportation proceedings can be made under §241(f) of the Immigration & Nationality Act [8 USC 1251(f)].

II.

The Question Presented for Review.

The question presented for review by this petition is when can an alien, who is deportable under some section of the Immigration & Nationality Act, utilize §241(f) of the Act [8 USC 1251(f)] to terminate deportation proceedings? More specifically, can an alien who fraudulently entered the United States with a visitor's visa and who is deportable under §241(a)(2) of the Immigration & Nationality Act [8 USC 1251(a)(2)] terminate the deportation proceedings under §241(f) if the alien has the requisite family relationships described in that section?

III.

Statement of the Case.

Petitioner is a female native and citizen of Canada. She was formerly married to the Canadian movie actor, Donald Sutherland. The couple had two children who were born in England.

During October of 1969, applications for an immigrant visa were filed for petitioner, her husband, petitioner's one child by a former marriage, and her two children by Donald Sutherland, at the American Con-

sulate in Montreal, Canada. Priority dates under the Western Hemisphere quota were granted for the entire family, including petitioner.

In the Fall of 1970, petitioner left the United States for a short vacation trip to Mexico, reentering on November 6, 1970, as a nonimmigrant under §101(a)(15)(b)(2) [8 USC 1101(a)(15)(b)(2)]. Two material facts were concealed from the immigration officer at the time of her reentry into the United States. First, she did not tell the officer that she intended to immigrate to the United States; and, in fact, had a priority date for immigration at the United States Consulate in Montreal, Canada. Second, she did not tell him that an indictment had been issued against her for violating 18 USC 371, 18 USC 2, and 26 USC 5861(d) in the United States District Court for the Central District of California, case No. 4846 CD; and thus, she may have been excludable under §212 of the Act [8 USC 1182].

In September of 1971, Donald Sutherland and his two children by petitioner went to Montreal, Canada, where the three received immigrant visas at the United States Consulate. They reentered as lawful permanent residents. Petitioner did not accompany them for two reasons. First, she and her husband had entered into divorce proceedings, which had become final, and were no longer living together. Second, the criminal proceedings (which were eventually dismissed) had placed a question in the mind of the Immigration and Naturalization Service as to whether or not she might be excludable under §212 of the Act [8 USC 1182]; and thus, ineligible to receive an immigrant visa.

On September 19, 1972, an Order to Show Cause was filed against petitioner, charging that she was de-

portable under §241(a)(2) of the Act [8 USC 1251 (a)(2)] as one who remained longer than her authorized stay in the United States. At the deportation hearing, evidence was introduced that petition had joint custody with Donald Sutherland of the two lawful permanent resident children and that both were living with her. On that basis, petitioner applied for termination of proceedings under §241(f) of the Act [8 USC 1251(f)].

The immigration judge granted voluntary departure, but denied termination of the proceedings under §241 (f) of the Act. An appeal was taken to the Board of Immigration Appeals which was dismissed in an opinion dated September 21, 1973. A petition for review under §106 of the Act [8 USC 1106] was then filed with the United States Court of Appeals for the Ninth Circuit, which subsequently affirmed the opinion of the Board of Immigration Appeals ordering petitioner to be deported.

IV.

Reasons for Allowance of the Writ.

Section 241(f) of the Act reads as follows:

> "(f) The provisions of this section relating to the deportation of aliens within the United States on the ground that they were excludable at the time of entry as aliens who have sought to procure, or have procured visas or other documentation, or entry into the United States by fraud or misrepresentation shall not apply to an alien otherwise admissible at the time of entry who is the spouse, parent, or a child of a United States citizen or of an alien lawfully admitted for permanent residence."

It is conceded that petitioner is the parent of aliens lawfully admitted for permanent residence and that her deportation from the United States would cause considerable hardship to the family. Either the two lawful permanent resident children would have to reside with her in Canada, thus, separating them from Donald Sutherland, the father who is a lawful permanent resident of the United States; or else, the children would have to remain with the father in the United States, separating them from petitioner in Canada. The facts are such that they clearly fit the purpose of §241(f) as defined in *INS v. Errico*, 385 U.S. 214, 220, as follows:

> "The intent of the act is plainly to grant exceptions to the rigorous provisions of the 1952 Act for the purpose of keeping family units together. Congress felt, that in many circumstances, it was more important to unite families and preserve family ties than it was to strictly enforce the quota limitations or even the many restrictive sections that are designed to keep undesirable or harmful aliens out of the country."

Since the *Errico* decision, *supra*, the courts of appeal of the different circuits have been in complete conflict as to what facts of entry into the United States would allow termination of proceedings under §241(f). For example, *Reid v. INS*, 492 F.2d 251 (2d Cir., 1974) (cert. granted Oct. 15, 1974, ... U.S. .....), case No. 73-1541, is at complete variance with *Lee Fook Chuey v. INS*, 439 F.2d 244 (9th Cir., 1971). Further, *Muslemi v. INS*, 408 F.2d 1196 (9th Cir., 1969); *Vitales v. INS*, 443 F.2d 343 (9th Cir., 1971) (cert granted U.S. S.Ct. remanded, 405 U.S. 983); and *Tokugawa v. Rosenberg*, 454 F.2d 423 (9th Cir.,

1971), totally conflict with *Cabuco-Flores v. INS*—*Mangabat v. INS*, 477 F.2d 108 (9th Cir., 1973), and *Milande v. INS*, 484 F.2d 774 (7th Cir., 1973).

In granting the Petition for Writ of Certiorari in *Reid v. INS, supra*, the Court must have recognized this conflict between the circuits on the question of what facts of entry would qualify an alien for relief under §241(f). However, *Reid, supra*, is a case where the aliens entered the United States by falsely representing themselves to be United States citizens. To present a complete picture, the court should also have under review a case where the facts of entry involved fraud in connection with a visitor's visa under §101(a)(15)(b) of the Act [8 USC 1101(a)(15)(b)]. Such was the situation in *Vitales v. INS, supra*, where the alien entered with a nonimmigrant visitor's visa that was tainted by fraud.

Petitioner finds herself in the same situation as Mrs. Vitales. When she last entered on her visitor's visa, she had to have intended to immigrate to the United States because in the previous year she had filed the necessary documents to immigrate at the American Consulate in Montreal, Canada, and had been granted a priority date for Western Hemisphere immigration. She had also been involved in activities which led to her indictment for crimes under federal law. Had she not withheld these facts from the immigration officer at the port of entry in Los Angeles on November 6, 1970, she would have been excluded as a matter of law. *Ammeriar v. INS*, 438 F.2d 1028 (3rd Cir., 1971); *Lee v. INS*, 446 F.2d 881 (9th Cir., 1971); *Chen v. Foley*, 385 F.2d 1929 (6th Cir., 1967).

V.

Conclusion.

There is no question that the courts of appeal of the different circuits have been in conflict on the issue of what facts of entry qualify an alien to file a motion to terminate deportation proceedings under §241(f) of the Immigration & Nationality Act. Because *Reid v. INS, supra,* involves entry under a false claim to citizenship, consideration of that case alone will not solve the dilemma. There should also be considered a case of fraudulent entry by use of a visitor's visa such as the *Vitales* case, *supra.* Consideration of petitioner's case who, like Mrs. Vitales, fraudulently entered under a visitor's visa, would allow the court to make a complete determination of the question which has caused such a conflict between the different courts of appeal.

For these reasons, petitioner asks that the writ of certiorari be granted and that this case be consolidated for hearing with *Reid v. INS, supra.*

Dated: November 14, 1974.

Respectfully submitted,

RONALD H. BONAPARTE,
Attorney for Petitioner.

APPENDIX.

In Deportation Proceedings.

United States Department of Justice, Immigration and Naturalization Service.

File: A 19 078 736—Los Angeles.

November 2, 1972.

In the Matter of Shirley Jean Sutherland, Respondent.

Charge: I&N Act Section 241(a)(2).

Nonimmigrant remained longer.

Application: Termination of proceedings of Section 241(f) of the Act alternative of voluntary departure.

On Behalf of Respondent: Frank S. Pestana, Esquire, 619 So. Bonnie Brae Ave., Los Angeles, California 90057.

On Behalf of Service: Joseph A. Shonman, Esquire, Trial Attorney, Los Angeles, California.

ORAL DECISION OF THE SPECIAL INQUIRY OFFICER

The respondent herein is a married alien female 38 years of age a native and citizen of Canada who was admitted to the United States at Los Angeles, California on November 6, 1970 as a nonimmigrant visitor for a temporary period and authorized to remain in the United States until October 6, 1971. She has not departed from the United States.

At the hearing herein the respondent admitted the truth of allegations number 1 and 2 contained in the Order to Show Cause but denied allegations 3, 4 and 5 and also denied deportability on the charge contained therein.

The denial of the allegations contained in the Order to Show Cause present no issue as allegations numbered 3 and 4 contained in the Order to Show Cause are supported by a Form I-94 which shows the admission of the respondent on November 6, 1970 at Los Angeles, California class B-2 for a period to expire on May 5, 1971 (Exhibit #3). Exhibit #4 contains an application for extension of temporary stay in the United States which shows a grant of such extension to October 6, 1971.

The respondent is deportable on the charge contained in the Order to Show Cause on the basis of the evidence of record which is clear, convincing and unequivocal unless she is entitled to status as a non-deportable alien under Section 241(f) of the Act. Counsel for the respondent moved for termination of the proceedings under that section because the respondent has in the United States 2 children who have been admitted for permanent residence. Her husband likewise was admitted for permanent residence but he separated from the respondent and they are presently engaged in a divorce proceedings which has resulted in an interlocutory decree. According to the testimony the respondent and her husband and 2 children of their marriage and also a third child by a prior marriage of the respondent entered the United States at Los Angeles, California on November 6, 1971 [sic] being admitted as nonimmigrant visitors. Prior to coming to the United States the respondent, her husband and the 2 children of their marriage had made application for immigrant visas at Montreal, Canada in October, 1969. After the admission of the respondent and her family into the United States immigrant visas were issued to the respondent's husband and their 2 children and the 3 of them were

admitted to the United States at Toronto, Canada on September 14, 1971. The respondent's visa was not issued to her at that time and that visa is still pending before the Department of State. Counsel advised that he had been advised by the American Consul that certain additional documentary evidence was to be submitted in support of the application for the immigrant visa. Apparently if there is any special reason for the non-issuance of the visa, this has not been disclosed.

The only element under Section 241(f) of the Act which exists in this case is the required family relationship. The respondent has in the United States 2 children who are permanent residents of the United States. She testified that the children are residing with her. There is no proof of any kind that any fraud was committed by the respondent at the time of her entry on November 6, 1970 either in connection with the obtaining of the nonimmigrant visa or in connection with her admission to the United States. I do not find that the provisions of Section 241(f) of the Act are in any way applicable to the respondent's situation and consequently her motion for termination of the deportation proceedings will be denied.

The respondent has applied for the privilege of voluntary departure in lieu of deportation. It appears that she is statutorily eligible for that relief. She testified that she has never been arrested except for one occasion in September, 1968 when she was charged with illegal possession of explosives but that this charge was dismissed on December 1, 1971. Her application for voluntary departure will be granted.

The allegations of fact and the charge contained in the Order to Show Cause are adopted as and for the findings of fact and conclusions of law herein.

The respondent has designated Canada as the country of deportation.

Order: It is Ordered that the motion of the respondent for termination of the deportation proceedings herein be and is hereby denied.

It is Further Ordered that in lieu of deportation the respondent be granted voluntary departure without expense to the Government on or before December 2, 1972 or any extension beyond such stay as may be granted by the District Director and under such conditions as the District Director shall direct.

It is Further Ordered that if the respondent fails to depart when and as required the privilege of voluntary departure shall be withdrawn without further notice or proceedings and the following order shall thereupon become immediately effective. The respondent shall be deported from the United States to Canada on the charge contained in the Order to Show Cause.

/s/ Benjamin G. Myron
Benjamin G. Myron
Special Inquiry Officer

In Deportation Proceedings Appeal.

In re: Shirley Jean *Sutherland, in Deportation Proceedings Appeal.*

United States Department of Justice, Board of Immigration Appeals, Washington, D.C. 20530.

File: A19 078 736—Los Angeles.

On Behalf of Respondent: Frank S. Pestana, Esquire, Kidwell & Pestana, 619 South Bonnie Brae Street, Los Angeles, Calif. 90057.

On Behalf of I&N Service: David L. Milhollan, Appellate Trial Attorney, Joseph A. Shonman, Trial Attorney.

Oral Argument: March 13, 1973.

Charges: Order: Section 241(a)(2), I&N Act (8 U.S.C. 1251(a)(2))—Nonimmigrant visitor—remained longer than permitted.

Application: Termination of proceedings or extended voluntary departure.

This is an appeal from an order of an immigration judge, dated November 2, 1972, which found the respondent deportable, denied her request for termination of the proceedings, and granted her voluntary departure. The appeal will be dismissed.

The respondent is a 39-year-old divorced female alien who is a native and citizen of Canada. She is the mother of three children, two of whom are lawful permanent residents. The respondent was originally admitted to the United States on November 6, 1970 as a nonimmigrant visitor and was authorized to remain until May 6, 1971. She applied for, and was granted, a six-month extension of time to remain in this country. How-

ever, she failed to depart on October 6, 1970 [sic] as directed. Consequently, she was served with an Order to Show Cause and deportation proceedings were commenced.

Although the respondent denied that she entered the United States on November 6, 1970 as a nonimmigrant visitor and further denied that she did not depart the United States as directed, we find that sufficient competent evidence was introduced which proves to our satisfaction that the respondent is a nonimmigrant and remained longer than permitted. Further, we agree with the conclusion of the immigration judge that the respondent is not entitled to termination of proceedings under section 241(f) of the Act. In *Cabuco-Flores v. INS*, 477 F.2d 108 (9 Cir. 1973), the Ninth Circuit Court of Appeals held that an exemption from deportation under section 241(f) is not available to a nonimmigrant who remained longer than authorized. Moreover, the fraud asserted by the respondent did not pertain to a fraud or misrepresentation in the procuring of the respondent's visa. "Section 241(f) by its very terms applies to aliens who were excludable at the time of their entry by reason of some fraud or misrepresentation by which they effected their entry," *Matter of West*, 12 I&N Dec. 683, 686 (BIA 1968).[1] Accordingly, we find deportability has been established by clear, convincing and unequivocal evidence.

On appeal, the respondent asserted that the Immigration and Nationality Act "as construed and applied in this case is unconstitutional." This tribunal can easily dispose of that assertion since we have consistently held

[1]See *Khadjenouri v. INS*, 460 F.2d 461 (9 Cir. 1972); *Matter of Alemis*, 12 I&N Dec. 456 (BIA 1967).

that "it is not within the province of this Board to pass on the constitutionality of the statutes which we administer," *Matter of L-*, 4 I&N Dec. 556 (BIA 1951). See *Matter of Santana*, 13 I&N Dec. 362 (BIA 1960).

The respondent contended that the immigration judge acted arbitrarily and capriciously in refusing to grant indefinite voluntary departure. This assertion is without merit. Pursuant to 8 C.F.R. 244.2, any request for an extension of time within which to depart voluntarily shall be filed with the District Director and no appeal may be taken from that decision. Based upon the foregoing, the following order will be entered.

ORDER: The appeal is dismissed.

FURTHER ORDER: Pursuant to the immigration judge's order, the respondent is permitted to depart from the United States voluntarily within 30 days from the date of this order or any extension beyond that time as may be granted by the District Director; and in the event of failure so to depart, the respondent shall be deported as provided in the immigration judge's order.

/s/ Maurice O. Roberts
Chairman

WFM:dtw

Order.

United States Court of Appeals for the Ninth Circuit.

Shirley Jean Sutherland, Petitioner vs. Immigration & Naturalization Service, Respondent. No. 74-1440.

Filed: July 29, 1974.

Before: Ely and Wallace, Circuit Judges.

The order of deportation entered by the Board of Immigration Appeals on September 21, 1973 is hereby affirmed.

/s/ Walter Ely
/s/ J. Clifford Wallace
U.S. Circuit Judges

Order.

United States Court of Appeals for the Ninth Circuit.

Shirley Jean Sutherland, Petitioner, vs. Immigration & Naturalization Service, Respondent. No. 74-1440.

Filed: Oct. 15, 1974.

Before: Ely and Wallace, Circuit Judges.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on the petition for rehearing en banc. Fed.R.App.P. 35(b).

The petition for rehearing en banc is rejected.

Order Staying Issuance of Mandate.

United States Court of Appeals for the Ninth Circuit.

Shirley Jean Sutherland, Petitioner, v. Immigration and Naturalization Service, Respondent. No. 74-1440.

Filed: Oct. 24, 1974.

Upon application of Ronald H. Bonaparte, counsel for the Petitioner, and good cause appearing, IT IS ORDERED that the issuance, under Rule 41(a) of the Federal Rules of Appellate Procedure, of the certified copy of the judgment of this Court in the above cause be and hereby is stayed pending the filing, consideration and disposition by the Supreme Court of the United States of a petition for writ of certiorari to be made by the Petitioner herein, provided such petition is filed in the Clerk's Office of the Supreme Court of the United States on or before November 16, 1974.

In the event the petition for writ of certiorari is granted, then this stay is to continue pending the final disposition of the case by the Supreme Court of the United States.

/s/ Walter Ely
Walter Ely
United States Circuit Judge.

Dated: Los Angeles, Calif. October 24, 1974.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-592

SHIRLEY JEAN SUTHERLAND, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner, an alien temporary visitor who overstayed her period of admission, contends that she is entitled to relief under Section 241(f) of the Immigration and Nationality Act, as amended, 18 U.S.C. 1251, because of an alleged fraud she committed at the time of entry into the country.

Petitioner, a citizen of Canada, was admitted into the United States at Los Angeles, California, on November 6, 1970, as a nonimmigrant visitor and authorized to remain in this country until May 6, 1971. She was granted an extension of stay until October 6, 1971. Petitioner has two children who have been admitted for permanent residence.[1]

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[1]After petitioner and her husband, Donald Sutherland, had been divorced, he and their two children received immigrant visas from the American Consulate in Montreal, Canada, and re-entered the country as lawful permanent residents.

On September 19, 1972, an Order to Show Cause was issued alleging that petitioner was deportable pursuant to Section 241(a)(2) of the Act, as amended, 8 U.S.C. 1251(a)(2). During the hearing, petitioner moved for a termination of the deportation proceedings pursuant to Section 241(f), 8 U.S.C. 1251(f), on the ground that she had committed fraud upon her entry into the country.[2] The Immigration judge rejected her contention and found her deportable as charged (Pet. App. 1). The Board of Immigration Appeals dismissed the appeal (Pet. App. 5). The court of appeals affirmed (Pet. App. 8).

1. Petitioner's contention that her deportation pursuant to Section 241(a)(2) is waived by Section 241(f) because of her entry as a temporary visitor into the United States by fraud (and her relationship to her two resident alien children) is not supported by *Immigration and Naturalization Service* v. *Errico*, 385 U.S. 214.[3] In *Errico*, this Court held that Section 241(f) waives only those deportation charges which result directly from the misrepresentation, provided that the alien was otherwise admissible at the time of entry. The charge against petitioner, that she overstayed her period of admission, does not result directly from fraud at entry. *Milande* v. *Immigration and Naturalization Service*, 484 F. 2d 774, 776 (C.A. 7); *Cabuco-Flores* v. *Immigration and Naturalization Service*, 477 F. 2d 108, 110 (C.A. 9), certiorari denied, 414 U.S. 841. Petitioner is deportable

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[2]Petitioner contends that she concealed her intention to immigrate to the United States and that she had been indicted for possession of explosives in violation of 18 U.S.C. 2, 371 and 26 U.S.C. 5861(d).

[3]The Court in *Errico* was not concerned with an overstayed visitor's visa but with two immigrants who had gained entry by fraud. One had received first preference quota status by misrepresenting his occupational experience; the other had entered into a fraudulent proxy marriage with a United States citizen in order to obtain nonquota status. When the Immigration and Naturalization Service sought to deport these immigrants because of quota irregularities, the Court held that Section 241(f) waived such deportation which resulted directly from their fraud.

solely because she has failed to depart from the country upon expiration of her authorized temporary stay. Her deportability is unrelated to any misrepresentations which she may have made upon entry.[4]

Additionally, we note, that the legislative history relied upon by the Court in *Errico* indicates that Section 241(f) is limited to those who have entered as immigrants through the visa issuing process.[5] Neither by express terms nor by implication did *Errico* extend Section 241(f) treatment to those aliens who enter as visitors and thereby circumvent the visa immigration system.

2. Nor is there a conflict in the circuits, after the decision in *Errico,* concerning the deportability for overstay of a temporary visitor who commits fraud at entry. The courts have uniformly held that Section 241(f) is applicable only if fraud is germane to the charge and that fraud at entry is irrelevant to a charge of overstay. *Milande* v. *Immigration and Naturalization Service, supra,* 484 F. 2d at 776; *Preux* v. *Immigration and Naturalization Service,* 484 F. 2d 396, 397 (C.A. 10), certiorari denied, 415 U.S. 916; *Cabuco-Flores* v. *Immigration and Naturalization Service, supra,* 477 F. 2d at 110; *Jolley* v. *Immigration and Naturalization Service,*

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[4]The Immigration judge found that her conduct at entry was not fraudulent (Pet. App. 3).

[5]See, *Iqbal* v. *Immigration and Naturalization Service,* C.A. 9, No. 72-2539, decided June 27, 1973, which held that Section 241(f) applies only to aliens who enter as immigrants.

441 F. 2d 1245, 1251-1252 (C.A. 5), certiorari denied, 404 U.S. 946; *Muslemi* v. *Immigration and Naturalization Service*, 408 F. 2d 1196, 1199 (C.A. 9).[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

FEBRUARY 1975.

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[3]Petitioner refers to the conflict concerning whether a person who enters the country under a false claim of citizenship is entitled to Section 241(f) relief. *Reid* v. *Immigration and Naturalization Service*, 492 F. 2d 251 (C.A. 2), certiorari granted October 15, 1974, No. 73-1541 (Section 241(f) relief not available); *Lee Fook Chuey* v. *Immigration and Naturlization Service*, 439 F. 2d 244 (C.A. 9) (such relief available). However, resolution of this issue is not related to the question presented herein; thus, there is no need to hold this case in abeyance until *Reid* has been decided.